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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Implementation of the
Telecommunications Act of 1996:

Telecommunications Carriers' Use
of Customer Proprietary Network
Information and Other Customer
Information

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CC Docket No. 96-115

**COMMENTS OF BELL ATLANTIC MOBILE, INC.
SUPPORTING PETITIONS FOR FORBEARANCE**

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SUMMARY: FORBEARANCE FOR CMRS IS REQUIRED.

Section 10(a) of the Communications Act compels the Commission to forbear from enforcing a rule when each of the three prongs of that provision are met. The Commission has before it numerous petitions showing that, pursuant to Section 10, it must take the following action:

Forbear from enforcement of 47 C.F.R. §§ 64.2005(b)(1) and (b)(3) with respect to wireless carriers' provision of wireless-related equipment and services.

Section 64.2005(b)(1) restricts carriers' use of CPNI to market customer premises equipment and information services to their own customers. Section 64.2005(b)(3) restricts the use of CPNI in efforts to "win back" former customers.¹

¹ The rules were intended to implement Section 222 of the Act, which created a new framework for carriers' use and disclosure of CPNI. They were adopted in Implementation of the Telecommunications Act of 1996: Telecommunica-
(continued...)

Bell Atlantic Mobile, Inc. (BAM) files these comments to supply further information showing that all of the tests for forbearance from these rules are met with respect to the offering of CMRS-related equipment and services by wireless providers.² This information confirms that restricting CMRS carriers from using CPNI to offer CMRS-related equipment and information services to their own subscribers, or to win back subscribers, is not only unnecessary to guard against unlawful practices or otherwise to protect consumers, but actually harms consumers and competition and undermines many of the Commission's public interest goals for CMRS.

Where the conditions for forbearance exist, the Commission has recognized its statutory obligation to grant forbearance.³ The requirement to forbear from

(...continued)

tions Carriers' Use of Customer Proprietary Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (Second Report and Order).

² Several petitioners also show that forbearance from these rules is required as well for other telecommunications carriers. E.g., GTE Petition for Forbearance, Reconsideration and Clarification, Bell Atlantic Petition for Partial Reconsideration and Forbearance. BAM agrees that the record also makes clear the obligation to forbear as to all services. Because BAM is a CMRS carrier, these comments focus on forbearance with regard to CMRS.

³ Federal Communications Bar Association Petition for Forbearance Under Section 310(d) of the Communications Act, 13 FCC Rcd 6293 (1998); Bell Operating Companies Petition for Forbearance from Application of Section 272 of the Communications Act, 13 FCC Rcd 2627 (1998); Hyperion Telecommunications, Inc., 12 FCC Rcd 8596 (1997) (forbearance from interstate access tariffs); Policy and Rules Concerning the Interstate Interexchange Marketplace, 11 FCC Rcd 20730 (1996); appeal pending sub nom. MCI Telecommunications Corp. v. FCC, No. 96-1549 (D.C. Cir.) (forbearance from tariffs); Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411 (1994) (forbearance from Sections 203, 204, 205, 211, 212 and 214 for CMRS providers).

enforcing these rules against CMRS providers is particularly clear here, and the Commission should take that action without delay.⁴

Prong No. 1: Enforcement of Sections 64.2005(b)(1) and (b)(3) against CMRS providers is not necessary to protect against unjust, unreasonable or discriminatory rates or practices. The Commission did not find that the rules were needed because CMRS providers' use of CPNI was unjust or unreasonable, but in fact acknowledged that such practices (such as bundling) benefit consumers and competition. There is no connection between the rules and CMRS carriers' ability to engage in the types of conduct addressed by this first test. Moreover, as an economist with experience in studying CMRS explains in an attached declaration, and as the Commission has indicated in its own decisions addressing CMRS competition and forbearance,

⁴ Petitioners, joined by many other parties, also seek reconsideration and repeal of Sections 64.2005(b)(1) and (b)(3). They show that the Commission wrongly held that Section 222 compelled adoption of the rules, that there were no facts to support the Commission's assumptions in imposing them, and that the rules were particularly unjustified for CMRS given the technical and historical integration of wireless equipment and service offerings. E.g., GTE Petition at 6-12; Vanguard Cellular Systems Petition for Reconsideration and Clarification at 3-7; AT&T Petition for Reconsideration and/or Clarification at 3, 5-6 ("The Commission clearly erred" in restricting the use of CPNI for winback efforts, and "improperly construed the limitations of Section 222(c)(1)" to restrict the use of CPNI to market wireless equipment and information services); CTIA Petition for Reconsideration and Forbearance at 14-24 (explaining why the two rules violate Section 222(c)(1)).

BAM agrees that the rules lacked the requisite statutory and record basis and are thus unlawful. In any event, even if the Commission continues to assert that its view of Section 222 is correct, the multiple petitions for forbearance require the Commission to determine whether the criteria for forbearance exist and, if so, it must forbear.

competitive forces in the CMRS market supplemented by Sections 201 and 202 of the Act provide sufficient discipline against attempts to engage in unjust or unreasonable practices.

Prong No. 2: Enforcement is not necessary to protect consumers. Privacy is an important societal goal, and many of the new CPNI rules are properly drawn to protect privacy expectations. Sections 64.2005(b)(1) and (b)(3), however, are not. The three attached declarations supplement the record on this point and show why these rules are not needed to achieve Section 222's consumer privacy goals. First, contrary to the assumptions underlying these rules (assumptions that lacked any record support), CMRS subscribers expect to be informed about new CMRS-related equipment and services, because those offerings are within the scope of the existing CMRS carrier-customer relationship – the very relationship that the Commission used to define where CPNI could be freely used. The rules do not protect customer expectations; they undermine them. Second, BAM and other carriers have many procedures in place to protect subscribers' privacy. The Commission's other new CPNI rules add still further privacy protections. Because these procedures and requirements fully safeguard privacy expectations, Sections 64.2005(b)(1) and (b)(3) are not needed. Third, the two CPNI rules will harm, not protect, consumers:

Regulation that restricts the use of CPNI in a competitive industry decreases consumer welfare below the level it would otherwise reach. Economic analysis confirms that enforcing these rules against wireless carriers will have numerous deleterious effects that harm consumer welfare. The rules will deprive subscribers of information about new wireless offerings that may meet their particular communications needs, will force carriers to engage in inefficient marketing that will

drive up their costs, will impair subscribers from obtaining lower prices, and will decrease competition.⁵

Prong No. 3: Forbearance is consistent with the public interest. The Commission has held that this final prong should consider the impact of a rule or provision on enhancing carrier efficiencies, promoting competition, and achieving other Commission policies. The two CPNI rules at issue undermine all three. They impede the direct, vigorous competition that occurs when carriers make offerings tailored to customers' needs and when carriers engage in win back efforts. The prohibition against targeted win back efforts is unprecedented in law and seriously anticompetitive. Economic analysis also shows that the restraints on CMRS providers' use of CPNI to market CMRS-related goods and services will increase carrier costs by forcing them to engage in inefficient "non-differentiated" marketing in which they cannot target consumers with offerings that respond to subscribers' needs and interests. This will drive up promotional costs, already a major part of a CMRS expenses, and ultimately put upward pressure on prices. The rules will also impair achievement of numerous goals the Commission has set for wireless services, including the offering of niche services, deployment of digital technology, efficient and flexible use of spectrum, and bundling – all of which the Commission has found to serve the public interest.

Forbearance from applying Sections 64.2005(b)(1) and (b)(3) to CMRS is thus required. The record, and the law, permit no other result.

⁵ Declaration of Dr. Jerry A. Hausman at ¶ 6 (attached as Exhibit 1).

I. THE TWO CPNI RULES ARE NOT NECESSARY TO ENSURE THAT CMRS RATES AND PRACTICES ARE LAWFUL.

The first prong for forbearance asks if enforcement of a provision or rule against a telecommunications carrier or service "is not necessary to ensure that the charges, practices, classifications or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 153(a)(1).

Petitioners show that forbearance from enforcement of Sections 64.2005(b)(1) and (b)(3) against CMRS providers clearly meets this first prong.⁶ CMRS rates are not regulated by the Commission or the states. The new rules in any event do not attempt to regulate rates for any wireless services or equipment and thus cannot be "necessary" to guard against unjust rates.

Enforcement is also not necessary to preclude unjust, unreasonable or unlawfully discriminatory CMRS practices. First, the Commission did not find in

⁶ See GTE Petition at 4-5, 13, 18-19; Primeco Personal Communications, L.P. Petition for Limited Reconsideration and/or Forbearance at 11-15; CTIA Petition at 35-38 (all discussing first forbearance prong).

Commissioner Ness recently acknowledged the harms of regulation on competitive markets, and observed that these costs "tend to be exacerbated when, as in the case of telecommunications, the underlying technology and the marketplace are changing so rapidly. Thus, it is particularly important that we not extend or retain regulations when competitive pressures are sufficient to protect consumers against the exercise of market power. Fortunately, the '96 Act give us the ability to forebear from regulation when there is meaningful competition between service providers." Remarks Before the Computer and Communications Industry Association, June 9, 1998 (emphasis added). Her remarks illustrate why forbearance from imposing the two CPNI rules on the rapidly changing CMRS market is justified.

this proceeding that a CMRS provider's use of CPNI to offer new CMRS-related services and equipment to its own customers constituted an unjust practice that the new rules would guard against. To the contrary, the Commission acknowledged that certain CMRS marketing practices, such as bundling of service and CPE, were in fact pro-competitive and benefited consumers. Enforcement of a rule that restricts these pro-consumer offerings is clearly "not necessary" to guard against unlawful carrier practices, because the conduct the rules attempt to prohibit is not itself unjust, unreasonable or discriminatory.

Second, the level of competition in the CMRS industry provides its own safeguards against carriers who might seek to engage in unlawful conduct. The Commission has previously held that the first element of forbearance is met where competitive conditions are sufficient to guard against unjust or unreasonable practices,⁷ and those conditions clearly exist here. To supplement the record, BAM supplies with these comments a declaration of Dr. Jerry A. Hausman, who has studied the economic effects of regulation on CMRS competition. Hausman Decl. at ¶¶ 3-4, 8. He explains why the level of competition among CMRS providers adequately disciplines the market: "Given the level of competition in the CMRS industry, the potential for any one carrier to set rates at "unjust or unreasonable"

⁷ Hyperion Telecommunications, Inc., 12 FCC Rcd 8596 (1996) (granting forbearance from tariff requirements). Indeed it would be arbitrary for the Commission not to find the first prong of Section 10(a) is met with regard to the CPNI rules at issue, given its own precedent interpreting that statutory provision. See GTE Petition at 4-5, 13.

levels is minimal, because the competitive marketplace exerts sufficient discipline on carriers to eliminate that conduct as unprofitable. A CMRS provider which attempts to set rates at unjust or unreasonable levels will not be able to sustain that practice because competitors will seize on that action to attract not only new customers but also that provider's own customers in sufficient amounts to make the attempted action unprofitable." Id. at ¶ 8.⁸

Third, should a CMRS provider attempt to engage in unjust or unreasonable practices, Sections 201 and 202 of the Act are available as enforcement remedies. The Commission determined four years ago that these remedies provided ample safeguards to permit forbearance from applying six provisions of Title II to CMRS in light of the level of CMRS competition which then existed.⁹ The rapid increase in competition since then makes reliance on Sections 201 and 202 instead of additional detailed rules even more appropriate today. Put another way, given the

⁸ The findings in the Commission's most recent report on CMRS competition are consistent with Dr. Hausman's analysis. That report contains no data or evidence showing market failure; to the contrary, it details the many pro-competitive developments that it finds have brought lower prices, new services and other benefits to consumers, and it concludes that over the past year, "competition in the mobile telephone market grew more than it had ever before." Third Annual CMRS Competition Report, released June 11, 1998, at 60.

⁹ Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411, 1475 (1994): "Forbearance from enforcing sections of Title II is appropriate where filing and other regulatory requirements would be imposed on CMRS providers without yielding significant consumer benefits." Given the record here showing the lack of any consumer benefits from the two specific CPNI rules at issue, forbearance is also required in this case.

Commission's findings in 1994 that the presence of Sections 201 and 202 enabled it to forbear and instead to rely on the market forces which existed at that time, it cannot rationally conclude that the far more competitive market forces are inadequate today. Dr. Hausman concludes that, because of the choices CMRS customers have among providers and other factors, "CPNI could not be used for anti-competitive purposes in the CMRS industry," and that "there is no economic rationale for finding that the two new CPNI rules would be necessary to prevent unjust or unreasonable CMRS provider rates and practices." Id. at ¶ 9.¹⁰

II. THE RULES ARE NOT NECESSARY TO PROTECT CMRS SUBSCRIBERS OR THEIR PRIVACY EXPECTATIONS.

The second forbearance prong asks whether enforcement of the rule or provision at issue "is not necessary for the protection of consumers." 47 U.S.C. § 153(a)(2). The Second Report and Order correctly stated that Section 222 was intended to protect customers' expectations about the privacy of CPNI as well as to promote competition. Petitioners show that Sections 64.2005(b)(1) and (b)(3) go far beyond achieving the privacy goals of Section 222 and that, rather than protect customer privacy expectations, these rules undermine those expectations by interfering with the carrier-customer relationship.

¹⁰ Other parties, notably new entrants into the CMRS market, agree with this assessment. E.g., Primeco Petition at 13 ("The rigors of the competitive CMRS marketplace eliminate opportunities and incentives for CMRS carriers to act in an unreasonable or anticompetitive manner with respect to the use of CPNI.").

BAM is highly sensitive to the privacy interests of its subscribers and fully agrees with the privacy objectives of Section 222. Many of the new CPNI rules properly achieve those objectives by, for example, restricting the disclosure of CPNI to third parties without customer consent. Sections 64.2005(b)(1) and (b)(3) do not, however, regulate any disclosure by carriers of CPNI to other parties, but instead directly intrude into carriers' ability to contact their own customers. BAM submits three declarations to supplement the record on the second forbearance prong, which show that the new rules are not necessary to achieve Section 222's objectives and that they will to the contrary harm consumer welfare.

A. The Rules Do Not Protect CMRS Customer Privacy Expectations.

The Commission interpreted Section 222 to allow carriers to use CPNI to the full extent of the "existing customer-carrier relationship." Second Report and Order at ¶ 23. Within that relationship, it found, customers expect carriers to use CPNI. It is only when the carrier seeks to use CPNI outside of that relationship that the privacy concerns of Section 222 intervene. While that approach was correct, the Commission then departed from it in addressing CMRS. As the parties challenging the Second Report and Order explain, the CPNI rules incorrectly define the scope of that relationship for CMRS carriers and subscribers by placing outside the "existing customer-carrier relationship" the very products and services that have always been within that relationship. CMRS information services and equipment have always been offered to CMRS subscribers for both historical and technical reasons, and the

Commission itself – far from restricting that practice – found that this benefits subscribers.

Both parties seeking forbearance and parties requesting reconsideration are unanimous that these two specific rules are not compelled by Section 222 and do not achieve that provision's privacy goals. These rules in fact violate that provision because, under the Commission's own interpretation as to when Section 222 requires constraints on the use of CPNI, offerings by wireless carriers of CMRS-related CPE and information services are within the "existing customer-carrier relationship."¹¹ Consumers are protected by the many other new CPNI rules which ensure that CPNI cannot be used beyond the carrier-customer relationship without customer approval and which regulate carriers' internal use of CPNI.

The uncontradicted record shows that, because of the technical relationship of CMRS-related equipment and services, and wireless carriers' historical practice of offering them on an integrated basis, customers expect their carrier to contact them about such equipment and information services.¹² GTE submits a statement

¹¹ See, e.g., CTIA Petition at 14-17; Omnipoint Communications Petition for Reconsideration and Clarification at 4-9; Commnet Cellular Petition for Reconsideration and Clarification at 5-8. CTIA correctly shows why the new rules fail to address the distinct federal policy toward regulation of CMRS and ignore the technical and licensing realities of CMRS that place both CPE and "information" services within the scope of Section 222(c)(1). *Id.* at 18-24.

¹² Metrocall, Inc. Petition for Reconsideration or Clarification at 8-9 (rules impair consumer benefits and competition goals of Section 222); Ameritech Petition for Reconsideration at 3-4 (reporting that 98.9% of persons in focus group approved of being contacted about wireless phones, and 93.1% approved of being contacted about voice mail); Primeco Petition at 6 ("Many
(continued...)

from its director of wireless marketing which explains why customers expect to be contacted about these offerings. Declaration of Marc Lefar at ¶¶ 11-12.

BAM supplies a declaration from Eileen Creeden, its Director of Customer Services Support (attached as Exhibit 2), which confirms that offerings of CMRS-related equipment and information services are within the scope of the “existing carrier-customer relationship” for which CPNI should be able to be used under Section 222. Ms. Creeden notes that BAM has typically used CPNI to offer equipment, accessories and services such as voice mail. Decl. at ¶ 3. Subscribers are free to place their names on a “Do Not Call” list and will thereafter not be contacted about new offerings. Id. at ¶ 4.

Ms. Creeden further declares that BAM’s review of three years of customer service records revealed not a single complaint to BAM, the FCC, state public service commissions or state attorney generals as to the use of billing records to sell customers additional products or services. Interviews of customer service managers and representatives in BAM’s customer service operations again revealed no CPNI-related complaints. Id. at ¶ 6. Rather than objecting to the use of CPNI, some

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consumers find voice mail to be an essential component of their mobility service”); BellSouth Petition for Reconsideration at 6-10 (“the Commission ... abandoned its reliance on customer expectations as the guiding interpretive principle ...”); TDS Telecommunications Corp. Petition for Reconsideration at 2-4 (explaining why the rules go far beyond the privacy objectives of Section 222 “by adding a new consent requirement for non-controversial pre-existing lawful uses of CPNI by carriers”); Vanguard Petition at 9-12; Commnet Cellular Petition at 5-8.

customers asked, for example, why they were not contacted about voice mail. Id. at ¶ 7. Ms. Creeden concludes, based on this research, that customers “expect that BAM will use their wireless telephone and billing records to sell them all of the wireless-related products and services that BAM offers.” Id. at ¶ 8.

B. Sufficient Privacy Safeguards Exist.

BAM takes seriously the importance of protecting the privacy of all of its subscribers. It (like other CMRS providers) has adopted detailed procedures to assure that subscriber privacy is maintained. The declaration of Steven Tugentman, Executive Director - Contracting and Commercial Operations for BAM, attached as Exhibit 3, reviews these privacy safeguards which are codified in formal company policies and practices. They include the following privacy protections:

-- BAM has a formal written “Code of Business Conduct” which is distributed to and signed by every BAM employee annually. The Code reflects the importance BAM places on customer privacy generally and on CPNI in particular. It strictly regulates the use and disclosure of CPNI, details employees’ duties with respect to CPNI, and imposes penalties for noncompliance. The Code requires preservation of “the privacy and integrity of customer property and records,” prohibits the unauthorized use of customer records, and prohibits employees from removing or disclosing customer information. Tugentman Decl. at ¶ 4.

-- BAM has detailed policies to comply with the privacy requirements of the Telephone Consumer Protection Act (TCPA), including maintaining a “do not call”

list to ensure that customers who do not wish to be called are not contacted, training telemarketing employees, regulating the operation of all telemarketing efforts, and making compliance with the TCPA an obligation under the Code of Business Conduct. Id. at ¶¶ 4, 7.

-- BAM has adopted a "Computerized Information Security Policy," an "Internet Security Policy" and a "Privacy Statement" available on the company's web page, which further demonstrate its commitment to the security, privacy and confidentiality interests of customers. Id. at ¶¶ 6, 8.

These and other customer privacy policies and procedures enable BAM's subscribers to control whether and how BAM uses information about them to sell them products and services, and safeguards the use and disclosure of that information. Mr. Tugentman concludes that the two CPNI rules at issue "will give no incremental practical protection to a Bell Atlantic Mobile customer. These rules will, however, severely hamper a customer's ability to get useful information on Bell Atlantic Mobile's products and services." Id. at ¶ 2.

C. The Rules Will Harm Consumer Welfare.

Dr. Hausman states, "Regulation that restricts the use of CPNI in a competitive industry decreases consumer welfare below the level it would otherwise reach. Economic analysis confirms that enforcing these rules against wireless carriers will have numerous deleterious effects that harm consumer welfare. ... In my judgment, the two rules at issue will harm consumer welfare, not protect it." Hausman Decl.

at ¶¶ 6, 10. He discusses the importance of information to a functioning competitive market, and how consumers use that information to make optimal choices:

The free flow of information by suppliers and buyers is essential to the working of an efficient and competitive market. If by regulation suppliers are restricted in the information they can provide about their goods and services, or if consumers are unable to obtain information, efficient and informed consumer choice is impaired. The new CPNI rules cause precisely this harmful result in the CMRS market because they suppress the free flow of information. This is particularly serious because it erects barriers to offerings that CMRS providers would otherwise make to their own customers tailored to those customers' communications needs and interests. Id. at ¶ 11.

Dr. Hausman explains the loss in consumer welfare that occurs when customers are unaware of products and services which better meet their needs, because they will not choose the optimal bundle of goods and services. For example, a CMRS carrier may use CPNI that shows a customer had many unanswered incoming calls to offer that customer voice mail, thereby providing advantageous information to the customer. The new rules, however, restrict that offering, prevent this flow of information, and thereby impede consumer welfare. Id. at ¶¶ 12-13. In this way, consumers are deprived of information that will benefit them.

The rule prohibiting the use of CPNI to seek to "win back" former CMRS customers is equally injurious to consumers. When a CMRS customer cancels his service with his or her current provider, the provider will typically attempt to regain the customer by offering a more attractive service package. The provider needs to use the customer CPNI to determine the plan the customer may find most attractive. As Dr. Hausman explains, this flow of information to the customer in

the win back situation has two benefits: First, it may enable the customer to select a more optimal mix of services and prices. Second, "This direct price competition benefits consumers because it leads to lower consumer prices." *Id.* at ¶ 20.

Rather than achieving the privacy goals of Section 222, the two rules at issue interfere with the relationship between a customer and his or her own carrier. While there are legitimate privacy concerns warranting restraints on a carrier's provision of CPNI to a third party with whom the customer has no relationship, those concerns are not at issue here. The narrow relief sought will, in short, not undermine privacy expectations protected by Section 222 because it will simply enable communications between subscribers and their own carrier.

III. FORBEARANCE IS CONSISTENT WITH THE PUBLIC INTEREST.

Section 10(a)(3), the final forbearance prong, requires the Commission to determine if forbearance "is consistent with the public interest." 47 U.S.C. § 153(a)(3). "In making the determination under subsection (a)(3), "the Commission shall consider whether forbearance ... will promote competitive market conditions." 47 U.S.C. § 153(b). The Commission has held that this test requires it not only to consider competitive impacts, but also to weigh whether forbearance will enable the more efficient provision of services and will help achieve other Commission policies. Even where forbearance would not promote competition, the Section 10(a)(3) test is met if it would promote other policies. Here, forbearance will both promote competition and promote many other Commission policies. Given Commission

precedent interpreting this provision, it must find that forbearance from the two CPNI rules at issue is consistent with the public interest.

A. The Rules Impair Competition.

Under the third forbearance prong, forbearance will be consistent with the public interest where it promotes competitive market conditions or enhances competition. This is the case with the two CPNI rules at issue. Petitioners demonstrate how the rules will impede competition.¹³ Dr. Hausman explains how carriers use CPNI to engage in marketing efforts that promote competition, and how the new rules will frustrate the pro-competitive efforts. He states, "There can be no economic rationale for these rules" given their adverse impact on competition and other harms. Hausman Decl. at ¶¶ 6-7. He discusses in particular the injury they cause to the direct competition that occurs when one CMRS provider seeks to regain a customer:

A prohibition on using CPNI in a win-back situation is anti-competitive. Suppose that suppliers of a given product agreed not to make their current customers a better offer if the customer obtains a lower price from a competing supplier. The potential new supplier

¹³ E.g., AT&T Petition at 3-5; CTIA Petition at 22-24; 360 Degree Communication Petition at 10-11 (all discussing the strongly pro-competitive impact of bundled offerings and win back efforts, their downward pressure on CMRS prices, and the harms that Section 64.2005(b)(3) will cause to competition and consumers). BAM has placed in the record an article documenting the pro-consumer benefits of win back efforts by wireless carriers. "Yakking it Up: For Wireless Services, Talk Gets Far Cheaper As Competition Rages," Wall Street Journal, April 27, 1998, at A1, Bell Atlantic Mobile ex parte submission, CC Docket No. 96-115, April 30, 1998.

would not offer as low a price because of the knowledge that the previous supplier would not attempt to regain the business. Thus, customer would pay higher prices and this restraint of trade would harm consumers. *Id.* at ¶ 22.

The win back rule will also impair the growth of CMRS by discouraging carriers from making the significant upfront investment required to obtain new customers, even though such investment serves the public interest:

The economic harm in the anti-win back rule is not merely the loss to competition and higher prices to consumers. In addition, by limiting win-back programs, CMRS providers will not find it as economically attractive to spend the hundreds of dollars in marketing expenses, telephone equipment rebates, and free air time that they currently spend to attract new customers. After the expenditure of this money, CMRS providers must retain customers for a significant period of time for the expenditure to be profitable, on average. However, if CMRS providers cannot attempt to regain their customers using CPNI-targeted win-back programs, they will spend less initially on attracting customers. Fewer consumers will use CMRS services, which will also decrease consumer welfare. ... By decreasing the incentive to offer low handset prices, the new rules harm consumers and decrease the growth of CMRS. Hausman Decl. at ¶ 23.

B. The Rules Increase Carrier Costs and Inefficiencies.

The Commission's recent forbearance decisions hold that the third statutory prong is met when forbearance will alleviate burdens and inefficiencies which a rule would otherwise impose on carriers, apart from any competitive analysis.¹⁴

¹⁴ Federal Communications Bar Association Petition for Forbearance Under Section 310(d) of the Communications Act, 13 FCC Rcd 6293, 63-4-05 (1998) (granting forbearance in part because it would eliminate cost burdens on carriers); Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act, 13 FCC Rcd 2627, 2639-52 (1998) (BOC Forbearance Order). In the latter case, forbearance (continued...)

Petitioners demonstrate that the new rules impair cost-efficient marketing.¹⁵ Dr. Hausman further explains in the attached declaration that these rules increase CMRS provider costs by forcing them to engage in inefficient, “non-differentiated” marketing in which they cannot target consumers with offerings that are tailored to individual subscribers’ needs and interests. Hausman Decl. at ¶ 15. For example, a carrier cannot seek to market voice mail to a customer who had not previously subscribed to that or a similar service, but whose records indicate may benefit from that service, resulting in less cost-effective marketing. *Id.* CMRS carriers engage in targeted marketing because this is the most efficient way to get information into the hands of customers who are most likely to benefit from it and purchase the offering. *Id.* By inhibiting such marketing, the new CPNI rules will drive up advertising and promotional costs, already a major part of a CMRS provider’s expenses.

(...continued)

from one of the separate affiliate requirements of the Act was granted because applying the requirement to the BOCs “would prevent them from continuing to realize the economies and efficiencies” that prior waivers allowed. The Bureau granted forbearance despite ruling that the record “will not support a finding” that forbearance “will promote competition” pursuant to Section 10(b). It held that “the plain meaning” of Section 10 “is that a determination that forbearance would promote competition is a possible, though not a necessary, basis for finding that forbearance would be consistent with the public interest.” *Id.* at 2651-52.

¹⁵ *E.g.*, GTE Petition at 14 (“Forbearance will reduce administrative costs because carriers can use CPNI to identify customers who are most likely to be interested in new services and thereby avoid the wasted expense of marketing to customers who are unlikely to benefit.”); Commnet Cellular Petition at 8-9.

C. The Rules Impede Policies Promoting Deployment of Niche Services, Efficient and Flexible Spectrum Use, Conversion to Digital Technologies, and Bundling.

In prior forbearance decisions, the Commission has stated that while the third Section 10 test requires consideration of competitive effects, that is not the end of the inquiry, and that it also must consider the impact of granting or denying forbearance on its other rules and policies designed to achieve public interest goals. "In requiring us to consider" competitive effects, "Congress clearly did not intend to preclude our consideration of other factors. The public interest is a broad standard, to be exercised consistent with the underlying goals of the Communications Act, as amended by the 1996 Act." BOC Section 272 Forbearance Order, 13 FCC Rcd at 2651. In that case, it found that forbearance from a separate affiliate requirement would help promote the integrity and reliability of Enhanced 911 services, which it found was in the public interest. Here, not one but many separate Commission public interest goals for CMRS would be compromised by the two CPNI rules at issue unless forbearance is granted.¹⁶

1. Niche Services. As the CMRS industry matures, carriers are seeking newer services that will attract subscribers or expand usage by existing subscribers.

¹⁶ The adverse impact of Sections 64.2005(b)(1) and (b)(3) on the Commission's own CMRS policies was detailed in CTIA's Request for Deferral and Clarification, filed April 24, 1998, at 18-22. CTIA correctly observed that the Second Report and Order did not consider any of these harms on CMRS and barely considered the harms of the new CPNI rules to CMRS customers and competition at all. The Commission has never acted on CTIA's Petition, nor explained why it has failed to act.

Such “niche” services will use vacant spectrum and thus serve Commission objectives for maximizing public benefits from wireless technologies, but, given their high up-front costs, carriers must be able to target efficiently and cost-effectively those customers who are likely to subscribe to them. Dr. Hausman explains the problem the CPNI rules will cause by precluding such targeted marketing: “If, however, carriers must incur the higher costs of promoting that niche service on a blanket, undifferentiated basis, the higher costs of doing so will be a disincentive to deploying it. In this way the restraints on use of CPNI may cause the new service not to be offered or be delayed.” Hausman Decl. at ¶ 16. He notes studies establishing the high value flowing to the public from new services and the danger in retarding their development: “The Commission should be especially concerned that its prohibition on the use of CPNI will retard the introduction of new services by the CMRS industry.” *Id.*

2. *Efficient Spectrum Utilization.* The Commission has similarly sought to encourage CMRS carriers to use radio spectrum efficiently to benefit subscribers. The rules’ restriction on using CPNI to develop offerings for particular customers targeted to their needs impedes this policy: “Wireless carriers use CPNI to target customers that are most likely to subscribe to new offerings and thereby increase their use of service, thereby increasing overall use of the network. The new rules, however, impair carriers from identifying and contacting those very customers. In this way, the rules will impede maximum use of licensed spectrum.” Hausman Decl. at ¶ 17.

3. Flexible Spectrum Use. The Commission has found that the public interest is served by enabling the “flexible” use of radio spectrum by licensees, and that allowing CMRS providers the freedom to offer an unlimited variety of services over their licensed frequencies promotes spectrum efficiency and will help stimulate wireless competition to landline carriers.¹⁷ The CPNI rules at issue undermines this policy by carving out CPE and “information” services and precluding CMRS carriers from offering them using CPNI without prior customer approval. This is directly counter to the flexible use policy. The segregation of CPE and information services is a landline principle developed years ago to address concerns arising from landline carriers’ market power that are irrelevant to CMRS; it was never applied to CMRS. Worse, transposing these irrelevant distinctions onto CMRS deprives consumers of the benefits of receiving information about advanced offerings.

4. Digital Deployment. The Commission has promoted digital technologies as serving many public interest goals, including more efficient spectrum usage.¹⁸ Petitioners demonstrate why the benefits of digital conversion are reduced by the new CPNI rules, and thus why forbearance is warranted to avoid those harms.

¹⁷ Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, 11 FCC Rcd 8965 (permitting unrestricted use for all types of services “will stimulate wireless competition in the local exchange market, encourage innovation and experimentation in development of wireless services and lead to a greater variety of service offerings to consumers”).

¹⁸ Amendment of the Commission’s Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957 (1994) (benefits to consumers and spectrum efficiency of digital technologies).